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Nos. 07-1428/08-328

In the
Supreme Court of the United States

FRANK RICCI, et al.,

Petitioners,

v.

JOHN DESTEFANO, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND THE CENTER FOR COLLEGE AFFORDABILITY AND PRODUCTIVITY IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

This case presents an important issue regarding the proper interplay between Title VII and state or municipal laws that prohibit local government from using race, sex, color, or ethnicity when making public employment decisions. Here, Article XXX, Section 172, of the New Haven City charter expressly prohibits preferences or discrimination in hiring or promotions based on race or national origin. Nevertheless, New Haven discarded its race-neutral, job-related test results based upon the racial composition of those who passed compared to those who failed, on grounds that it faced potential liability under Title VII if it used the test results. This gives rise to the following question:

When it passed Title VII, did Congress intend to leave undisturbed state and local anti-discrimination laws that operate to eliminate public employers' use of race, sex, or ethnicity in public employment decisions?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF), and the Center for College Affordability and Productivity (CCAP) respectfully submit this brief amicus curiae in support of Petitioners Frank Ricci, et al.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus curiae in this Court in numerous cases relevant to this case. PLF has addressed the inequities of the disparate impact theory in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008), *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005), *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Found.*, 538 U.S. 188 (2003), *Adams v. Florida Power Corp.*, 535 U.S. 228 (2002), and *Alexander v. Sandoval*, 532 U.S. 275 (2001). PLF has also participated as amicus curiae in cases before this Court involving the scope and intent of Title VII of the Civil Rights Act of 1964, such as *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), *Bd. of Trustees of the Univ. of Ala.*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

v. Garrett, 531 U.S. 356 (2001), and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

PLF has also been at the forefront of the legal battles waged over state laws that prohibit government's use of race, sex, or ethnicity in public employment. In *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997), as amicus, PLF successfully defended California's Proposition 209 which amended the California Constitution to prohibit government from:

> discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a). PLF attorneys were counsel of record in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 12 P.3d 1068 (2000) (invalidating a race-conscious city contracting program under Proposition 209). PLF attorneys, representing the drafters and sponsors of Michigan's Proposal 2, the sister initiative of Proposition 209, participated as amicus curiae in successfully defending the constitutionality of this newly adopted state law in *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (D. Mich. 2008).

CCAP is a nonprofit organization dedicated to research on the issues of rising costs and stagnant efficiency in higher education in the United States, with an emphasis on how market forces can be used to make higher education more affordable while increasing quality.

This case raises important issues of constitutional law, public policy, and statutory interpretation regarding the extent to which race-conscious decisions may be used to avoid "disparate impact" liability under Title VII. Amici argue that Title VII does not preempt state and municipal laws that limit state and local government's discretion to use race, sex, or ethnicity in the employment context.

SUMMARY OF ARGUMENT

The City of New Haven decided to set aside the results of a promotion test for firefighters when too few minority candidates would be promoted if the test results were allowed to stand. The City feared that certifying the test results would expose it to liability under a "disparate impact" theory of discrimination. New Haven's decision brings into sharp focus how allowing racial disparities alone to provide the basis for a claim of unlawful discrimination leads to the type of race-based decisionmaking that Title VII was originally intended to eradicate.

New Haven made this decision notwithstanding Article XXX, Section 172, of its city charter (Section 172), which prohibits preferences or discrimination based on race or sex in civil service hiring decisions.[2] Section 172 is but one example of state or local laws that prohibit government from using race, sex, or ethnicity in official decisionmaking. The states of California, Michigan, Washington, and Nebraska have enacted statewide laws that likewise

[2] Article XXX, Section 172, provides in part: "No person . . . shall be appointed, promoted, reduced, removed, or in any way favored or discriminated against because of race, sex, age, national origin, or political or religious opinion or affiliation."

prohibit preferences or discrimination based on race or sex. With language similar in form and identical in effect to New Haven's City charter, California adopted Proposition 209 in 1996. The operative provision of Proposition 209 provides:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a). Identical language appears in the constitutions of Michigan (art. I, § 26(2)) and Nebraska (art. I, § 30(1)) as well as the Revised Codes of Washington (Section 49.60.030). The intent and effect of such state anti-discrimination laws is to eliminate government's authority to redistribute opportunities based on these immutable characteristics.

Although Plaintiffs did not challenge the decision to discard the test results as being a violation of Section 172, a decision by this Court that condones such race-based decisionmaking under the auspices of Title VII will weaken such laws considerably. Such a decision would be contrary to Title VII's clearly expressed legislative intent and plain language. *See*, *e.g.*, *Coal. for Econ. Equity*, 122 F.3d at 710 (finding Title VII does not preempt Proposition 209); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 n.24 (1983) (finding state fair employment laws were not preempted by Title VII).

Nevertheless, groups opposed to such laws have attacked them on grounds that they are preempted by

Title VII of the Civil Rights Act of 1964. For example, plaintiffs challenging California's Proposition 209 unsuccessfully argued that Title VII preserves public employers' discretion to use race and sex preferences. *Coal. for Econ. Equity*, 122 F.3d at 709. The Ninth Circuit Court of Appeals rejected plaintiffs' argument that because Proposition 209 eliminates such preferences, Proposition 209 is preempted by Title VII. *Id.* The Ninth Circuit stated that Title VII will preempt state laws only where there is an actual conflict, and that "Proposition 209 does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII." *Id.* at 710.

Amici contend that Title VII's legislative history and an unbroken chain of court decisions examining Title VII's intent show that it does not preempt state and local laws that prohibit preferences and discrimination based on race, sex, or ethnicity.

Here, the City of New Haven's actions were an unadorned attempt to redistribute employment opportunities based upon race or sex. A decision from this Court that permits such actions by a public employer will open the door to identical actions throughout the nation. State and local governments will have their anti-discrimination laws weakened by a decision that permits public employers to reject race-neutral and job-related test results in order to achieve racial balancing under the auspices of Title VII.

This Court should clarify that state and local anti-discrimination laws do not conflict with, and in fact support, the policy objectives of Title VII and are therefore not preempted by Title VII.

ARGUMENT

TITLE VII DOES NOT PREEMPT STATE OR LOCAL LAWS REQUIRING RACE-NEUTRAL EMPLOYMENT DECISIONS

Many states and municipalities have laws that prohibit discriminatory race-based employment practices. Title VII, by its plain language, does not preempt these laws. Thus, federal courts may not rely upon Title VII to relieve municipalities of the duty to comply with such laws. Amici urge this Court to recognize that a decision condoning the use of race-based criteria for decisions in public employment will undermine the validity and effect of such laws.

In this case, the City of New Haven's charter, Article XXX, Section 172, provides in relevant part: "No person . . . shall be appointed, promoted, reduced, removed, or in any way favored or discriminated against because of race, sex, age, national origin, or political or religious opinion or affiliation." In *Kelly v. City of New Haven*, 275 Conn. 580, 881 A.2d 978 (2005), the Connecticut Supreme Court rejected the City of New Haven's efforts to extend its discretion in civil service hiring beyond the bounds set by its charter. *Id.* at 623 ("This court will not endorse an effort to interpret out of existence the legislative check on discretion that the legislators have chosen to keep in place.").

This prohibitory language in the New Haven City charter is similar in form and identical in function to statutes or constitutional provisions adopted by several states that operate to prohibit state and local governments' use of race, sex, or ethnicity in public

employment. The states of California, Washington, Michigan, and Nebraska have adopted statewide laws containing identical operative language:[3]

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a).[4] Groups opposing such state anti-discrimination laws have unsuccessfully argued that Title VII preempts such laws because they interfere with public entities' voluntary compliance with Title VII's objectives. This Court should clarify that such laws are not preempted by Title VII.

A. Congress Did Not Intend Title VII to Preempt Laws Prohibiting Race-Based Employment Decisions

In determining whether a state law is preempted by federal law and therefore invalid under the Supremacy Clause, a reviewing court's "sole task is to ascertain the intent of Congress." *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987) (Marshall, J., plurality opinion). Preemption will be found only if that was the clear and manifest purpose

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[3] California adopted Proposition 209 in November 1996. Michigan adopted identical language in November 2006. Nebraska followed suit in November 2008. The State of Washington adopted this language as a statutory rather than constitutional amendment with the passage of Initiative 200 in November 1998.

[4] These laws will be referred to herein collectively as "state anti-discrimination laws," with the understanding that they refer only to preferences or discrimination based on race or sex.

of Congress. *Id.* at 288; *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (federal law does not preempt certain banks from selling insurance); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (stating "the historic police powers of the States were not to be superseded by the Federal [Warehouse] Act unless that was the clear and manifest purpose of Congress"); *Keams v. Tempe Technical Inst., Inc.*, 39 F.3d 222, 227 (9th Cir. 1994) (state tort action against trade school accreditors is not preempted by Higher Education Act).

When ascertaining congressional intent, the plain language of the statute controls absent clear evidence of a contrary intent. *Bread Political Action Comm. v. Fed. Election Comm'n*, 455 U.S. 577, 580 (1982). The plain language of Title VII itself prohibits expressly such preferential treatment at 42 U.S.C. § 2000e-2(j), which states in part:

> Nothing contained [in Title VII] shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in . . . the available work force in any community, State, section, or other area.

This Court also noted Title VII's limited effect on state laws in *Guerra*, stating: "Congress has indicated that state laws will be pre-empted only if they actually

conflict with federal law." *Guerra*, 479 U.S. at 281 (Marshall, J., plurality opinion). Title VII does not preempt state anti-discrimination laws for the simple reason that Title VII does not *require* employers to use race and sex preferences.

The lead proponents of Title VII in the Senate, Senators Case and Clark, submitted an interpretive memorandum in support of Title VII, stating: "'[t]here is no requirement in Title VII that an employer maintain a racial balance in his work force.'" *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n*, 478 U.S. 421, 459 (1986) (quoting 110 Cong. Rec. 7213 (1964)). Senator Humphrey, another proponent of Title VII, stated:

> "The proponents of this bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group."

Id. at 461 (quoting 110 Cong. Rec. 12723 (1964)). Senator Humphrey explained further:

> "Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance."

Id. at 492 (quoting 110 Cong. Rec. 6549). Thus, the plain language and legislative history of Title VII confirm that the statute does not operate to invalidate state and local anti-discrimination laws.

Nor can it be said that the anti-discrimination laws noted above interfere with discretion Title VII bestows upon public employers to implement race-based affirmative action programs—because the original intent of Title VII does not bestow any such discretion. When Title VII was passed, Congress was particularly concerned with any undue interference on managerial discretion. *Local Number 93, Int'l Ass'n of Firefighters AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 519 (1986). Title VII passed on the assurance that "management prerogatives . . . are to be left undisturbed to the greatest extent possible." *Id.* at 520. Instead of preempting state anti-discrimination laws, Section 708 of Title VII "'simply left them where they were before the enactment of Title VII.'" *Shaw*, 463 U.S. at 103 n.24 (quoting *Pervel Indus., Inc. v. State of Conn. Comm'n on Human Rights & Opportunities*, 468 F. Supp. 490, 493 (D. Conn. 1978)).

In enacting Title VII, Congress was not legislating about preferential treatment or quotas in employment because it believed that "the problems raised by these controversial questions are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 207 n.7 (1979) (quoting remarks of Rep. MacGregor, 110 Cong. Rec. 15893 (1964)).

Likewise, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971), this Court stated:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired

> simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.

Congress' intent to enshrine *equality* as the standard of conduct under Title VII is wholly consistent with the intent behind state and local anti-discrimination laws. As a result of the harmony between both the intent and the effect of Title VII and anti-discrimination laws, Title VII does not operate to preempt such laws.

B. Title VII Does Not Require Race-Based Employment Decisions and Therefore Does Not Conflict With State Prohibitions on Race-Based Decisions

Whether Title VII should prohibit or require the use of racial preferences was the subject of much debate prior to its enactment. Many representatives were concerned that Title VII would unduly interfere with private business management decisions. *Local Number 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C.*, 478 U.S. at 519. To avoid this unwanted result, Congress neither mandated nor prohibited the use of racial preferences in employment. *Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 478 U.S. at 463 (observing that Title VII, Section 703(j) [codified at 42 U.S.C. § 2000e-2(j)] "stated expressly that the statute did not require an employer or labor union to adopt quotas or preferences simply because of a racial imbalance").

In *United Steelworkers*, this Court made clear its view that after Section 2000e-2(j) was adopted, "congressional comments were all to the effect that employers would not be *required* to institute preferential quotas to avoid Title VII liability." *United Steelworkers of America, AFL-CIO-CLC*, 443 U.S. at 207 n.7.

Numerous decisions have concluded Title VII does not mandate race- and sex-preferential treatment for minorities or women. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) ("Preferential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution."); *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("Title VII, however, does not demand that an employer give preferential treatment to minorities or women."); *United Steelworkers of America*, 443 U.S. at 205 (rejecting the argument that Title VII prohibits voluntary affirmative action efforts); *Coal. for Econ. Equity*, 122 F.3d at 709-10 (finding Title VII does not preempt California's Proposition 209); *Liao v. Tenn. Valley Auth.*, 867 F.2d 1366, 1369 (11th Cir. 1989) (absent a showing of discrimination, there is no Title VII cause of action for failure to implement or utilize an affirmative action program).

This Court has repeatedly found that Title VII *allows* but does not *require* affirmative action programs that target minorities and women. *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring) (stating that Title VII "does not *require* any employer to grant preferential treatment on the basis of race or gender"); *United Steelworkers of America*, 443 U.S. at 208 (holding that Title VII's prohibition against racial discrimination

does not condemn all private, voluntary affirmative action plans).

In *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978), this Court stated that "Title VII . . . does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees." As part of its analysis of the burden-shifting framework for cases arising under Title VII, the *Furnco* Court stated: "[i]t is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for each applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Id.* at 579.

Federal circuits have likewise held that the Civil Rights Act permits voluntary adoption of special programs, but does not require any employer to grant preferential treatment on the basis of race or sex. In *Yatvin v. Madison Metro. Sch. Dist.*, 840 F.2d 412, 415 (7th Cir. 1988); the Seventh Circuit held: "[t]he Constitution and Title VII have been held, with exceptions irrelevant here, to permit affirmative action; they do not require it." *See also Liao*, 867 F.2d at 1369; *Bratton v. City of Detroit*, 704 F.2d 878, 883-84 (6th Cir. 1983).

Consistent with these decisions regarding Title VII, the constitutionality of state anti-discrimination laws has been upheld against all manner of attack. In *Coal. for Econ. Equity*, the Ninth Circuit rejected the argument that California's anti-discrimination amendment, Proposition 209, was preempted by Title VII. Referring to Section 2000e-7's prohibition on state laws that "require or permit the doing of any act which would be an unlawful

employment practice," the Ninth Circuit said, "Proposition 209 does not remotely purport to require the doing of any act which would be an unlawful employment practice under Title VII. Quite the contrary, '[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.' " *Coal. for Econ. Equity*, 122 F.3d at 710 (quoting *Griggs*, 401 U.S. at 431). In *Coal. to Defend Affirmative Action*, 539 F. Supp. 2d at 930, the district court found that "Proposal 2 does not violate the United States Constitution."

The California Supreme Court relied upon Proposition 209 to invalidate a race-conscious public contracting program in *Hi-Voltage*. There, the court recognized that Proposition 209 was consistent with the original intent of Title VII, stating that "in approving Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, 'to achieve equality of [public employment, education, and contracting] opportunities.'" *Hi-Voltage*, 24 Cal. 4th at 561-62 (quoting *Griggs*, 401 U.S. at 429). *See* Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. Rev. 1335, 1345 (1997) (noting that like Title VII itself, Proposition 209 "bars discrimination against or preferential treatment in favor of 'any individual or [to any] group'" (quoting 42 U.S.C. § 2000e-2(j))).

Race-conscious employment decisions should not be allowed to stand by resorting to an imaginary conflict between state anti-discrimination laws and Title VII. So it is with New Haven's race-conscious decision to abandon its promotional test results. Although the district court's decision did not address this issue, New Haven's race-based decision to abandon

its test results violates it's city charter and is therefore unlawful. Title VII cannot be used to shield race-conscious decisions that violate state and local anti-discrimination laws. A decision from this Court that Title VII preempts local and state prohibitions on preferences based on race, sex, or ethnicity would significantly undermine the validity of such anti-discrimination laws and the lower court decisions that have upheld them.

CONCLUSION

The discrimination that took place in this case was not in the City of New Haven's promotional testing process—regardless of the racial composition of those who passed compared to those who failed. Rather, it was when New Haven decided to treat those who passed the exam as if they had failed in order to manipulate the racial composition of the list from which promotions would be made. Such a blatantly race-conscious decision, made to lower the likelihood of a potential disparate impact claim, constitutes the precise type of discrimination that Title VII was designed to prohibit. The City of New Haven should not be allowed to offer up those who passed the race-neutral and job-related promotional exam as a sacrifice to achieve racial balance.

In the course of reversing the Second Circuit Court of Appeals' decision, this Court should clarify that state and local anti-discrimination laws are not preempted by Title VII.

DATED: February, 2009.

Respectfully submitted,

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